Filed 1/30/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LYNCH, GILARDI & GRUMMER, Plaintiff, Cross-Defendant and Respondent, v. HODGE FOOD SERVICES, INC., et al., Defendants, Cross-Complainants and Appellants.	A092478 (Marin County Super. Ct. No. 170156)

The law firm of Lynch, Gilardi & Grummer (Lynch) represented appellant, Hodge Food Services, The Cantina, Ltd. and Cafe Café, Ltd., in an action brought by appellant against Mark J. Walker. Lynch also defended appellant against a cross-complaint filed by Walker. When appellant ceased paying Lynch's bills, Lynch filed suit against appellant, seeking payment for its services. Appellant cross-complained against Lynch on a theory of legal malpractice. Appellant appeals from a judgment, entered after a jury trial, awarding $112,700 to Lynch on its complaint, and awarding appellant nothing on its cross-complaint.

We will affirm.

BACKGROUND

On August 28, 1990, appellant, then represented by attorney David Jay Morgan, filed suit against Walker, stating five causes of action: (1) breach of oral agreement; (2) fraud; (3) negligent misrepresentation; (4) negligence and (5) intentional interference

with contractual relationships. In essence, appellant claimed that Walker made fraudulent misrepresentations that caused appellant to hire him and make him the president of Hodge Food Services, Inc., that Walker's performance in that capacity breached the employment agreement and constituted negligence, and that after appellant terminated Walker, and he began to work for a competitor, he sought to cause other of appellant's employees to breach their own employment agreements by leaving appellant and working instead for the competitor. Walker cross-complained for indemnity from appellant for any costs incurred as a result of appellant's action, citing Labor Code section 2802 and Corporations Code section 317, subdivision (d).[1] He later claimed a right to indemnity under the bylaws of Hodge Food Service, Inc.

Walker obtained a summary adjudication that appellant take nothing by its fifth cause of action (intentional interference with business relationships). The matter was scheduled to go to trial in the summer of 1994. At that time, Douglas Scott, the secretary of Hodge Food Services, Inc., asked attorney Morgan for an analysis of issues which, in appellant's opinion, would enable it to decide whether to pursue an out-of-court settlement or voluntary dismissal. Scott expressed concern that Walker's financial standing would affect appellant's ability to collect any judgment it might obtain as a result of the proceedings, further expressing concern that if Walker prevailed on his cross-complaint, appellant could be forced to pay "a six-figure sum of his attorney fees and costs which could equal or exceed any judgment we might get against him." Morgan replied that whether Walker would prevail on his indemnity claims was uncertain, and, in Morgan's opinion, there was no choice but to proceed with the lawsuit. Morgan wrote, "It is not as easy as you think . . . to dismiss a complaint. If you dismiss the complaint, then obviously Walker will bring a motion for attorneys' fees.

[1] Labor Code section 2802 requires an employer to indemnify its employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. Corporations Code section 317, subdivision (d), requires a corporation to indemnify a person to the extent that he or she has been successful on the merits in defense of an action brought against that person by reason of the fact that he or she is an agent of the corporation.

The matter did not proceed to trial at that time, and appellant and Morgan parted ways. In February 1995, Lynch substituted into the matter as counsel for appellant. By June 1995, Lynch had learned that Walker's attorneys were representing that Walker would file for bankruptcy if he lost the case. In addition, Lynch, on behalf of appellant, apparently had offered to dismiss appellant's lawsuit for a waiver of costs and a dismissal of Walker's cross-complaint. Walker rejected that offer, and his attorney, Thomas Hyde, told Lynch that Walker would be filing an action for malicious prosecution. Hyde wrote that the proposed dismissal ignored the value of a cause of action Walker would have against appellant for malicious prosecution. Walker, through attorney Hyde, offered to exchange mutual releases if appellant would pay Walker $250,000—an amount that Walker claimed approximated his attorney fees. Hyde wrote to Lynch that as he saw it, appellant had "the following three alternatives in descending order of preference. First, pay the $250,000 for mutual releases. Second, dismiss the complaint and take your chances on the indemnification agreement and the defense of the malicious prosecution case. Or third, proceed to trial and risk a higher indemnification award and an expanded claim for malicious prosecution."

The matter was set to go to trial in the summer of 1995. By that time Lynch had developed a strategy that required the dismissal of Hodge Food Service's causes of action for breach of contract and negligence. Lynch felt that Walker's assertion that he would declare bankruptcy if appellant prevailed, provided justification for the dismissal. A voluntary dismissal of the contract and negligence claims, therefore, would not be viewed as a termination favorable to Walker. Dismissal, however, would remove from trial any issues relating to Walker's performance as an employee, permitting appellant to argue that, as its claims were not based on Walker's status as its agent, Walker would have no right to indemnification as an agent of the corporation.

Robert Lynch, a partner in the Lynch law firm, testified that he discussed with Thomas Wilson, the owner of Hodge Food Services, Inc., the possibility of walking away from the case and taking his chances, or of paying some money to Walker to resolve the whole thing. Wilson's response was that he would never pay Walker. Lynch told Wilson

that one problem with simply walking away was that there already had been a judgment in favor of Walker on the fifth cause of action. Lynch also felt that a voluntary dismissal might be deemed a favorable termination for the other side, or at least would create a jury question as to whether or not Walker had obtained a favorable termination. In addition, dismissing the complaint would not dispose of the cross-complaint, and there was the threat of an action for malicious prosecution. Lynch felt that a dismissal would leave Walker with a favorable termination because of the ruling on the fifth cause of action, but that prevailing on at least some claim at trial probably would defeat any subsequent action for malicious prosecution. The various alternatives were discussed, orally, with Wilson on many occasions, including during a nine-hour office conference on July 10, 1995.

In a letter to appellant, also dated July 10, 1995, Robert Lynch wrote about Walker's claims for indemnification and threats to pursue a malicious prosecution action, writing also that he was providing appellant with a rough estimate of anticipated attorney fees so that appellant could "make an assessment of how you want to proceed in this action." The purpose of the July 10 letter, according to Lynch, was to give appellant the results of some of Lynch's research, and to let Wilson understand that there would be a lot of expense in going to trial, and let him decide if he might prefer to put the money somewhere else.

Robert Lynch wrote that Walker would not be able to pursue an action for malicious prosecution if appellant prevailed on any one of the causes of action alleged in its complaint. If appellant did not prevail, the question would be whether appellant nonetheless had probable cause for prosecuting the claims, an issue that would require litigation. In words that appellant later would use against him, Robert Lynch wrote:

"In summary, the key to defeating a future filing of a malicious prosecution action is to prevail at the trial. This does not mean that if we lose at trial, Mr. Walker will prevail on a claim for malicious prosecution. It simply means that Mr. Walker could, as his attorneys have threatened, file a lawsuit against Mr. Wilson, the plaintiffs and their attorneys if we do not obtain a verdict for plaintiffs in this action. It also means that we can dismiss the causes of action for breach of contract and negligence to limit the scope of relevant issues at trial and focus on the fraud without opening the door to a malicious

prosecution filing if we are successful at trial. We have advised proceeding on the misrepresentation claims only based purely on trial tactics and do not mean to imply that those claims lacked probable cause."

Lynch discussed Walker's several theories for indemnification, reminding appellant of earlier reports and discussions on the matter, and concluding that the best defense for appellant would be to prevail at trial on the fraud claim, although prevailing on that claim would not necessarily defeat a claim for indemnification under the permissive indemnification sections of Hodge Food Service Inc.'s bylaws. Lynch advised that even if they did not prevail, "then the primary defense to indemnification will be to argue that Mr. Walker was acting outside the scope of his agency and thus is not entitled to indemnification under either the permissive or mandatory indemnification provisions."

Finally, Lynch estimated that the total amount of attorney fees resulting from a trial of the matter would range from $88,750 to $94,250.

Appellant, as planned, dismissed the contract and negligence causes of action, making a record that the dismissal was because of Walker's assertion that he would file for bankruptcy should he lose, and not because those causes of action lacked merit. Lynch then moved to strike Walker's claims for indemnity, arguing, in part, that appellant's remaining claims were not based on Walker's actions as an employee/agent. The trial court denied the motion, apparently on the grounds that jury questions were presented, and the matter went to trial. Ultimately, the jury ruled that appellant's claims against Walker did not arise out of Walker's employment, and Lynch then again argued that Walker had no right to indemnity as a matter of law. The trial court, basing its ruling on the findings of the jury, held that Walker was not entitled to indemnity. The jury also found that Walker's representations to appellant were not false, and therefore determined that appellant should take nothing by its complaint. Walker prosecuted an unsuccessful appeal from the judgment on his cross-complaint. Walker also did indeed file a malicious prosecution action against appellant, which ultimately terminated in a settlement.

In the meantime, appellant ceased paying Lynch's bills, and this action was instituted.

The matter was tried to a jury, which returned a verdict finding that Hodge Food Services, Inc.—the corporate entity—had accepted the benefit of an attorney's fee contract offered by Lynch,[2] and that Lynch had not been negligent in its representation of appellant in the action against Walker. The court thereafter entered judgment that Lynch recover $267,117.46 as the fees earned by it in the Walker litigation and another matter, plus interest, and that appellant take nothing by its cross-complaint for legal malpractice.

DISCUSSION

I.

Theory of Malpractice

Appellant's theory against Lynch was and is that Lynch advised appellant to try the matter against Walker when, in appellant's opinion, trial could not and did not benefit appellant in any way, and therefore resulted only in the generation of attorney fees.

It will be recalled that Walker obtained summary judgment on appellant's fifth cause of action (tortious interference). Appellant asserted that Lynch incorrectly advised appellant that because of that termination, Walker could prevail in an action for malicious prosecution unless appellant prevailed on at least one of its other claims against Walker. According to appellant, however, prevailing on some other claim would not have precluded an action for malicious prosecution because the fifth cause of action was severable from the others, and a favorable termination as to it alone would support a claim of malicious prosecution. Appellant claims that Lynch based its opinion on the case of *Friedberg v. Cox* (1987) 197 Cal.App.3d 381, claiming further that minimal research would have disclosed that *Friedberg* had been distinguished by the court in *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, in a holding that, applied

[2] Apparently no individual had signed the fee contract on behalf of Hodge Food Services, Inc. The theory, then, was that the corporation nonetheless was bound because it had accepted the benefit of the contract.

to the facts of this case, meant that the favorable termination of the fifth cause of action, alone, would have provided grounds for a malicious prosecution action.[3]

Appellant also claims that Lynch incorrectly advised that dismissing the remaining causes of action, prior to trial, would not protect appellant from an action for malicious prosecution because Walker might argue, successfully, that the dismissal was a termination favorable to him. Appellant contends that, to the contrary, they could have avoided such an argument by informing the court (as, indeed they did when they dismissed the contract and negligence claims) that the claims were being dismissed because of Walker's threatened bankruptcy, and not because they lacked merit.[4]

---

[3] Appellant introduced into evidence a memorandum prepared by a law clerk at Lynch, that addressed the question of whether appellant might be held liable for malicious prosecution if certain claims were dropped. The law clerk, citing *Friedberg v. Cox, supra,* 197 Cal.App.3d 381, and other authorities, concluded that the general rule was that defendant would not be able to claim a favorable termination because some cause of action had been dropped if the plaintiff prevailed on any of its claims. The law clerk noted that an exception arises where there are "separable proceedings," but concluded that the exception still required a favorable termination of the entire action. In other words, it permits an action for malicious prosecution when only one of several claims are pled maliciously, so long as there is a favorable termination on all of the claims. Appellant contended that a simple reference to Shepard's, or to Witkin, would have turned up *Tabaz v. Cal Fed Finance, supra,* 27 Cal.App.4th 789, which, in appellant's opinion, explains that *Friedberg* recognized only that where a party seeks the same relief on several theories, recovery on one of the theories will bar an action for the malicious prosecution of any of the remaining theories. Appellant argued that anyone reading *Tabaz* would have realized that appellant could not have avoided an action for malicious prosecution of the tortious interference claims simply by prevailing on the fraud or misrepresentation claims, and theorized that Lynch breached the standard of care by failing to find or discuss *Tabaz.*

[4] There was an additional argument that, contrary to Lynch's advice, appellant could have avoided liability in any malicious prosecution action filed by Walker simply by asserting a defense of advice of counsel. Appellant, accordingly, contends that the failure of Lynch to discuss this defense with appellant provides further grounds for legal malpractice. When a witness attempted to explain the defense, however, the trial court sustained an objection that the witness was not entitled to summarize the law, and, although appellant's attorney argued to the jury that the defense was in fact available, it appears that the matter was dropped. The court, accordingly, stated on the record that it had been agreed that the jury would not be instructed on the defense of advice of counsel, a statement that we take as a recognition that appellant had abandoned that theory. In any

In support of these arguments, appellant sought and obtained instructions to the jury (1) that a lawsuit for malicious prosecution does not require proof of a favorable termination on every claim; rather, a favorable termination of any separable claim would support a malicious prosecution action; (2) that the complaint's fifth cause of action was separable; and (3) that Walker obtained a favorable termination on that claim.[5] Appellant also sought and obtained an instruction that a pretrial dismissal of the two claims that were taken to trial would not have been a termination of those claims favorable to Walker.[6] [7]

---

event, the jury never was informed of the nature of the defense, and, except for the witness's conclusory statement and the brief remark by counsel, was unaware of it. We consider the matter no further.

[5] The court's instructions on this issue, in full, were:

"Mr. Walker would have prevailed in his malicious prosecution suit against the Hodge parties if he were able to prove by a preponderance of the evidence, the following:

"One: The Hodge parties initiated and were actively instrumental in the commencement or maintenance of a separable claim against Mr. Walker.

"Two: That separable claim against Mr. Walker terminated in Mr. Walker's favor.

"Three: The Hodge parties acted without probable [cause] in commencing or maintaining that separable claim.

"Four: The Hodge parties acted with malice.

"And, five: The malicious action of the Hodge parties caused Mr. Walker to suffer injury, damage, loss, or harm.

"A lawsuit for malicious prosecution does not require proof of a favorable termination regarding every claim that the Hodge party had against Mr. Walker.

"Instead, the favorable termination element of a malicious prosecution claim may be based upon the favorable termination of any one separable claim that the Hodge party alleged against Mr. Walker.

"For malicious prosecution purposes the Hodge parties' claims against Mr. Walker for contractual interference, the so-called fifth cause of action, was separable from the other four claims that the Hodge parties brought against Mr. Walker.

"Mr. Walker obtained a favorable termination as to the Hodge parties' claim against Mr. Walker for contractual interference."

[6] The court instructed:

"Mr. Walker did not obtain a favorable termination as to the two dismissed claims relating to Mr. Walker's job performance, which were claims for breach of an oral employment agreement, and negligence during employment."

In sum, appellant's position is that Lynch breached the standard of care in failing to learn, through its research, that the fifth cause of action could form the basis of a malicious prosecution claim even if appellant prevailed on some of its other claims against Walker, and that Lynch further breached the standard of care in failing to recognize and advise that appellant could dismiss all four of its remaining causes of action without fear of a claim by Walker that the dismissals represented termination of those claims in his favor. In appellant's opinion, these breaches meant that it needlessly incurred the costs of trying its claims against Walker.

II.

Expert Opinion and Attorney Standard of Care

Appellant contends that the jury's determination that Lynch did not breach the standard of care is not supported by substantial evidence.

Appellant correctly asserts that as a general rule, in professional malpractice cases, expert testimony is required to prove that the defendant performed in accordance with the prevailing standard of care. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) Lynch introduced expert testimony on the issue of standard of care, in the form of the testimony of former Justice Robert Kane.

Justice Kane's qualifications are undisputed. He told the jury that he spent a couple of years in a trial practice firm plus several years doing a variety of work in another firm and in his own practice. He became a superior court judge in 1969, and, two

---

"If the two claims that were taken to trial had been voluntarily dismissed prior to trial, that determination in this case would not have been a favorable termination, from Mr. Walker's perspective."

[7] The trial court's reasoning was that the claims were dismissed not because appellant or Lynch believed they lacked merit, but for tactical reasons and because of the belief that any damages awarded because of them could not be collected. Appellant seems to suggest that this ruling means that Lynch should have known that Walker could not successfully argue that the voluntary dismissal of any of appellant's claims was a termination favorable to him. That the court in *this* case, however, found that the dismissal was not a termination favorable to Walker, does not mean that some other court would reach the same conclusion in an action for malicious prosecution.

years later, became an appellate court justice. He retired from the court in 1979, served a two-year stint as United States ambassador to Ireland, went back into practice and retired in 1993. He then went into alternative dispute resolution, and also, from time to time, testified in cases such as this case. He has tried over 250 cases to verdict, and holds a number of honors.

Justice Kane testified that in preparing for his testimony, he looked at the pleadings, including any attached correspondence or depositions. He reviewed the depositions of Mr. Wilson, Mr. Scott, Mr. Lynch and Ms. Madden. He therefore was fully aware of the nature of the dispute, of appellant's theories against Lynch, and of the work Lynch did on behalf of appellant.

Justice Kane explained that the standard of care is not violated simply because a lawyer makes a mistake. "The idea is that if the lawyer -- gathers sufficient information and makes a judgment or recommendation or expresses an opinion . . . the fact that it turns out by hindsight [to be wrong] does not mean that it was below the standard of care." Justice Kane confirmed that the standard of care ordinarily would require that the attorney gather sufficient information to make an appropriate prognostication, and that one of the questions would be whether the attorney did adequate research, looked at the appropriate issues and came to a reasoned decision. He testified that it was not below the standard of care for an attorney's efforts to prove unsuccessful, or for the attorney to make incorrect prediction, pointing out that the profession is not one of "certitude."

Justice Kane testified that, in his opinion, the dismissal of the remaining four causes of action in the matter against Walker would not have avoided a malicious prosecution action because an issue remained as to whether the fifth cause of action was severable. Any advice by Lynch, that in Lynch's opinion the fifth cause of action was not severable, however, would not be a breach of the standard of care because "We have not reached a point, I don't think, where we require a standard of clairvoyance." That a lawyer is mistaken is not "below the standard of care even though [a later] ruling . . . would indicate that he was wrong."

Justice Kane also testified that the question of whether voluntary dismissal of the remaining causes of action would have constituted a favorable termination for Walker for purposes of a malicious prosecution claim, would have been the subject of dispute, opining that Lynch did not breach the standard of care by failing to predict the outcome of that dispute. It was not below the standard of care for Lynch to advise appellant to proceed with caution, because a dismissal could be regarded as a favorable termination for Walker. Asked if Lynch's advice that in Lynch's opinion the best strategy was to try the case and hope to win part of it breached the standard of care, Justice Kane replied, "Clearly not."

The July 10 letter, in Justice Kane's opinion, did not fall below the standard of care. Indeed, according to Justice Kane, it is unusual for a lawyer to write such a detailed letter prior to trial, "Most of the discussions are verbal." Lawyers are not required to give all of their advice in a letter, and "lawyers, especially trial lawyers, are talking to their clients constantly, preparing the case in the course of trial, in recesses. Advice is a flowing thing." It is not a breach of the standard of care to give advice "-- even if the advice turns out to be erroneous." Finally, Justice Kane testified, "As I have testified previously in my deposition, my methodology in looking at this material, after talking to you and your associates, is to review the material that I was provided with, and to see if there is something that I can see in the conduct that tells me or suggests to me that there has been a deviation [from] the standard of care. [¶] That's what I'm looking for. I did that and didn't find any in this case."

Appellant, citing *People v. Bassett* (1968) 69 Cal.2d 122, and *Kelley v. Trunk, supra,* 66 Cal.App.4th 519, complains that Justice Kane's testimony was so conclusory as to provide no support for the jury's finding that Lynch did not breach the standard of care. We disagree. The court in *Bassett* was concerned with the testimony of prosecution witnesses that the defendant, who suffered from schizophrenia, had the mental capacity to commit murder. The court found that the conclusory statements of the witnesses did not provide substantial evidence that the defendant did indeed have the requisite mental capacity, pointing out that the witnesses had not examined the defendant

in person and, indeed, had not even observed him, notwithstanding that the personal interview is " '[t]he basic tool of psychiatric study.' " (*People v. Bassett, supra,* 69 Cal.2d at p. 142.) In addition, their reasoning—that a person with a truly severe case of paranoid schizophrenia would not have been able to make the detailed plan followed by this defendant, or to have taken, as he did, adequate notes in college level philosophy and psychology classes—did not address the defense theory that the defendant's plan "was the product not of his free will but of the imperative demands of his delusional system and hallucinated voices." (*Id.* at pp. 144-145.)

The witness in *Kelley v. Trunk, supra,* 66 Cal.App.4th 519, a physician, simply summarized the plaintiff's course of treatment, and then concluded that the defendant physician had not breached the standard of care. The court rejected this opinion as conclusory, pointing out that the expert had not identified the material on which he relied in forming his opinion, had not stated the nature of the plaintiff's condition, did not opine whether his condition was in any way related to the injury, whether the symptoms could have been observed, whether a reasonable doctor would have recognized in the plaintiff's complaints the possibility of complications such as the plaintiff in fact suffered and whether earlier intervention would have mitigated the effects of the plaintiff's injury. In short, the witness did not in any way explain the reasons for his conclusion, and "[w]ithout illuminating explanation, [the conclusion] was insufficient to carry Dr. Trunks's burden in moving for summary judgment." (*Id.* at p. 524.)

Here, unlike the witnesses in *Bassett,* Justice Kane employed the "basic tools" of analysis employed by experts in the field, basing his conclusions on his review of the pleadings, the complained-of letter and the depositions of the lawyers and the plaintiff. Unlike the *Bassett* witnesses, therefore, the witness here had the information required to form an expert opinion. In addition, unlike the testimony of the experts in *Bassett*, Justice Kane's testimony was responsive to appellant's theory that Lynch had committed malpractice by giving advice that turned out to be incorrect in light of subsequent rulings.

Unlike the witness in *Kelley,* Justice Kane did identify the material on which he relied in reaching his conclusions. In addition, in *Kelley,* expert testimony was needed to

establish whether there was a causal connection between the plaintiff's original injury and his condition, whether the condition might have been detected at some earlier time and whether an early detection would have prevented the severity of the condition. In the present case, in contrast, the question of the relationship between the advice provided by Lynch, and the injury claimed by appellant, was fully developed, and it therefore was unnecessary for Justice Kane to provide an expert opinion on the point. Moreover, unlike the expert in *Kelley*, Justice Kane stated the basis for his conclusions that Lynch had not breached the standard of care, explaining that the standard of care does not require that the advice be correct or that the attorney accurately predict the ultimate outcome of the action. It is enough that the attorney gathered sufficient information to enable him or her to make an appropriate prognostication, and that he or she provided advice based on that information.

Appellant asserts, however, that Justice Kane's testimony did not address the adequacy of Lynch's research. Appellant theorized that Lynch failed to act within the standard of care by failing adequately to research the issue of severable causes of action, arguing that if Lynch had used Witkin, or had Shepardized *Friedberg v. Cox*, it would have found *Tabaz v. Cal Fed Finance*, which would have led Lynch to understand that prevailing on some other cause of action could not have protected appellant from a malicious prosecution action on its fifth, severable, cause of action.

We note, initially, that although the memorandum written by Lynch's law clerk did not mention *Tabaz*, appellant never actually established that the law clerk failed to use Witkin or Shepard's. In addition, there was testimony that the law clerk's memorandum was but a portion of the research conducted by Lynch on the question of the effect of dismissal of appellant's claims. The law clerk was supervised by Elizabeth Madden, an attorney in the Lynch office, and Madden testified that she reviewed the work of her law clerks, and typically reviewed the primary cases that they relied upon. She also testified that she conducted research on appellant's case, including researching the question of what would happen if appellant voluntarily dismissed the case. Thus, the mere fact that the law clerk failed to cite *Tabaz*, although providing grounds to argue that

it might be inferred that no one at the law firm reviewed Witkin or Shepard's, did not establish that inference as a fact.

In addition, as appellant concedes, Justice Kane did discuss both Witkin and Shepard's, testifying that an attorney ordinarily would consult both as part of any research project. He testified that an attorney would not fall below the standard of care by failing to read every case that cites an earlier case, such as *Friedberg*—even one that Shepard's apparently cites as "distinguishing" the earlier case, such as *Tabaz* distinguishes *Friedberg*. Thus, although it was established that the law clerk's memorandum failed to cite *Tabaz*, and it might be inferred that he had failed to read that case, Justice Kane's testimony was that an attorney would not breach the standard of care by failing to read a distinguishing case.

Justice Kane also testified that he had looked at *Witkin*, and had read some of the other authorities relied upon by the parties. He stated that although he understood that it would not be appropriate for him to draw legal conclusions, he was of the belief that it was not below the standard of care for Lynch to view that the fifth cause of action as part of the "whole transaction," so that a favorable termination of one of the other claims would defeat a malicious prosecution action. Justice Kane, therefore, informed the jury that the law in the area was not subject to easy definition even after considering Witkin's analysis. That Lynch may have concluded that the fifth cause of action was not severable, therefore, did not require the further conclusion that its research was inadequate.

We do not agree that Justice Kane failed to respond to the argument that Lynch's research was inadequate. First, as discussed above, appellant did not conclusively establish that Lynch failed to use Witkin or Shepard's. Second, Justice Kane had before him the evidence of what Lynch did, and was fully aware of appellant's complaints about Lynch's work. Third, Justice Kane stated that an attorney ordinarily would look at Witkin, and he demonstrated his familiarity with Shepard's. Although Justice Kane did not say, in so many words, that he found that Lynch's research met the standard of care, with all this knowledge and all this material before him, his statement that Lynch's work

did not fall below the standard of care necessarily implied that the actions and claimed omissions also did not fall below the standard of care. In short, although there may be no direct testimony by Justice Kane that Lynch's research was adequate, his opinion that the research was in fact adequate is implied from his testimony.

Finally, we can find no grounds for arguing that Lynch breached the standard of care in its advice that the best means of defeating Walker's indemnity claims would be to dismiss the contract and negligence causes of action and to try the fraud and/or misrepresentation claims to a favorable verdict. Appellant complains that Lynch failed to advise appellant that the dismissal of all of the causes of action would defeat any claim to indemnity that Walker might have under Corporations Code section 317.[8] In light of the fact that Walker sought indemnity on two additional theories, and without a showing that dismissal would have defeated his claims under *those* theories, appellant cannot show that he was injured by the asserted omission.

As we have concluded that Justice Kane's testimony provides substantial evidence supporting the jury's verdict, we do not consider the weight that should be ascribed to the testimony of appellant's expert witnesses, or the sufficiency of the material relied upon by them.

In addition, having concluded that appellant is not entitled to reversal on the grounds that insufficient evidence supports the jury's verdict, we decline to address the claim that, upon retrial, appellant is entitled to seek all its legitimate damage claims notwithstanding the evidence that appellant's insurer paid a portion of appellant's defense in the malicious prosecution action filed by Walker against appellant, or that the insurer contributed to the settlement reached in those proceedings.

[8] Appellant asserts that attorney Elizabeth Madden, who worked for Lynch, was aware that, in light of the decision in *American Nat. Bank & Trust Co. v. Schigur (*1978) 83 Cal.App.3d 790, the dismissal of a cause of action will defeat a claim for mandatory indemnity.

III.

Jury Instructions

Appellant complains that the jury was instructed, over appellant's objection, that an attorney is "not liable for being in error as to questions of law on which reasonable doubt may be entertained by well informed lawyers;" that "[in] view of the complexity of the law and circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of a remedy or other procedural steps;" and that "[a] lawyer is not liable for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved." According to appellant, these instructions were erroneous because, contrary to the holding in *Smith v. Lewis* (1975) 13 Cal.3d 349, 359 (overruled on another point in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14), they did not inform the jury that an attorney can avoid liability for rendering what turns out to be an incorrect opinion only if he or she bases that opinion on adequate research.

We disagree that the instructions were erroneous, although we do agree that they were incomplete under *Smith v. Lewis.* As appellant concedes, however, the complained-of instructions were followed, immediately, by an instruction that, "Even with respect to an unsettled area of the law, an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to the course of conduct based upon an intelligent assessment of the problem." This instruction was directly patterned on the holding and language in *Smith v. Lewis*. We do not agree that the jury could have considered the instructions together and still have determined that an attorney, without first conducting reasonable research, could be absolved from liability for reaching an erroneous and unsupported decision, simply because the area of law at issue was unsettled or complex.

IV.

Attack on Mr. Wilson's Character

Appellant complains that in violation of in limine rulings, counsel for Lynch mounted a prejudicial attack on Thomas Wilson's character.

The court granted appellant's motion in limine that sought to exclude any evidence of Wilson's motives in suing Walker. Appellant also moved to exclude evidence that Wilson might have a poor character, citing a letter from Walker's counsel to Lynch that purported to warn Lynch about Mr. Wilson, asserting such things as that Wilson was a "rich, arrogant, and thoroughly disgusting human being." Appellant argued that evidence about Wilson's character would not reasonably establish any facts relevant to the trial's issues, that Evidence Code section 1101 bars evidence of character to prove conduct, and that in any event it should be excluded under Evidence Code section 352. During argument on the motion, counsel for Lynch argued, and the court agreed, that evidence of Wilson's character might be introduced on the question of credibility. The court, however, ruled that evidence of Wilson's character could not be introduced to show Wilson's conduct.

Appellant complains that notwithstanding these rulings, Lynch attempted several times during opening argument and in its examination of witnesses, to insinuate that Wilson was a man of poor character, who attempted to avoid his obligations and used lawsuits as a means of intimidation. For example, during opening argument, counsel asserted that "the Hodge Food litigants . . . sued a fellow they didn't think they could collect from . . . tried to figure a way out of it without ever offering Mr. Walker a red cent . . . tried to get their subsequent [attorney], Mr. Lynch, to collect money from their prior lawyer for his own fees . . . [and] [t]hen when Walker sues Hodge for malicious prosecution, what happens, they turn around and nail Mr. Lynch." Appellant also complains about questions such as whether there were other persons Mr. Wilson wanted Lynch to sue, or if Mr. Wilson considered suing his former attorney, David Jay, or considered suing Walker's attorney.

Finally, appellant complains that during closing argument, counsel suggested that "everything we need to know about Mr. Wilson and how he does business" was illustrated by his assertion that he did not need to pay Lynch's attorney fees, notwithstanding that he accepted the benefits of the parties' contract, because he didn't sign the contract. Counsel also stated that Wilson "stiffed" Lynch, that he used "economic terrorism" as a method of doing business, that he uses the legal system as a method of reprisal, and that "Mr. Wilson uses lawyers . . . the same way I use my Kleenex."

Counsel's questions and comments did not explore appellant's intentions in suing Walker, and therefore did not violate the first motion in limine. We also do not view the questions and comments as being particularly egregious. Although personal attacks on opposing parties, whether outright or by insinuation, constitute misconduct, counsel is granted wide latitude to discuss the merits of the case, both as to the law and facts, and is entitled to argue his or her case vigorously and to argue all reasonable inferences from the evidence. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799.) The questions of which appellant complains were not "personal attacks"; they were an attempt to elicit what appears to be the truth, even if the truth tended to reflect poorly on Wilson's character. In all events, the court sustained appellant's objections to the questions, typically admonishing counsel, and the jury, that they were not relevant to anything. And, although appellant complained about counsel's closing remarks in a motion for a new trial, no objection was interposed at the time argument was made. Misconduct of counsel in argument to the jury may not be urged for the first time on appeal absent a timely objection and request for admonition in the trial court if timely objection and admonition would have cured the harm. (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1247.) We do not view this as a case where a timely objection and admonition would have only increased the prejudice resulting from the argument.

V.

Attorney Fees

The trial court, upon the jury's finding that Hodge Food Services, Inc., had accepted the benefits of Lynch's fee agreement, ruled that it was contractually bound to pay fees under that agreement, notwithstanding that no one from Hodge Food Services had signed the agreement. The trial court accordingly awarded Lynch $112,700 as unpaid fees on that contract. The court awarded Lynch the same sum from the other defendants, on a theory of quantum meruit. (See Bus. & Prof. Code, § 6148, subd. (c), providing that a fee agreement that is not in writing is voidable, but "the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.")

Appellant contends that the latter award was erroneous, arguing that in order to prevail on a theory of quantum meruit, Lynch would have had to show that it conferred a benefit on appellant. Appellant, citing *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450, points out that "[t]he idea that one must be *benefited* by the goods and services bestowed is . . . integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery." According to appellant, although it is undisputed that Lynch devoted many attorney hours to the cause of the non-corporate defendants, they were not actually benefited by this work because, in appellant's opinion, the work was pointless.

Appellant confuses benefit conferred, with *value* of benefit received. The *Maglica* court was not discussing the *value* of the benefit conferred, but merely the fact that the party from whom the claimant is seeking compensation has actually received something from the claimant. Here, the non-corporate defendants were benefited in that they received Lynch's services. Although they may quibble with the trial court's assessments of the reasonable *value* of those services, they did receive them, and the trial court correctly found that Lynch could recover for the value of those services on a theory of quantum meruit.

Conclusion

The judgment is affirmed.

_____
Stein, Acting P.J.

We concur:

_____
Swager, J.

_____
Marchiano, J.